SUPREME COURT OF VICTORIA

COURT OF APPEAL

S EAPCR 2020 0099

JACOPO PALMISANO — Appellant

v

THE QUEEN — Respondent

JUDGES:	MAXWELL P and McLEISH JA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	29 April 2021
DATE OF JUDGMENT:	12 May 2021
MEDIUM NEUTRAL CITATION:	[2021] VSCA 124
JUDGMENT APPEALED FROM:	[2020] VCC 50 (Judge Carmody)

CRIMINAL LAW – Appeal – Sentence – Parity – Money laundering – Dealing in proceeds of crime worth $1,000 or more – Appellant in possession of $6,150 – Sentenced to 18 months' imprisonment – Co-offender in possession of $30,000 – Sentenced to 12 months' imprisonment – Whether differential between co-offenders' sentences reasonably open – Crown concession – Differential not reasonably open – Resentencing – Assessing offence gravity – Whether resentencing should affect total effective sentence and non-parole period – Appeal allowed – *Criminal Code 1995* (Cth) s 400.7(1).

APPEARANCES:	Counsel	Solicitors
For the Appellant	Mr D Ternovski	Michael J Gleeson & Associates
For the Respondent	Ms K Breckweg	Ms A Pavleka, Solicitor for Public Prosecutions (Cth)

MAXWELL P
McLEISH JA:

1 On 16 September 2019, the appellant pleaded guilty, before a judge of the County Court, to:

(a) one charge of attempting to possess a commercial quantity of a border controlled drug (cocaine);[1]

(b) one charge of dealing in proceeds of crime worth $1,000 or more;[2] and

(c) one charge of possessing a controlled drug (MDMA, ketamine and cocaine).[3]

2 The three charges carried maximum penalties of life imprisonment, 5 years' imprisonment, and 2 years' imprisonment, respectively.

3 On 3 February 2020, the judge sentenced the appellant to a total effective term of 5 years and 6 months' imprisonment, with a non-parole period of 3 years and 9 months. On the second charge, dealing in proceeds of crime worth $1,000 or more, the appellant was sentenced to 18 months' imprisonment, 6 months of which were cumulated on the base sentence of 5 years' imprisonment for the first charge.

4 One of the appellant's co-offenders, Fernando Tovar Carmona ('Tovar Carmona'), pleaded guilty at an earlier stage to charges arising from the same enterprise. He was sentenced by the same judge some six months before the appellant.[4] Tovar Carmona received a total effective term of 14 years and 6 months' imprisonment, with a non-parole period of 10 years. On a charge of dealing in proceeds of crime worth $10,000 or more, he received a sentence of 12 months' imprisonment, 6 months of which were cumulated. This charge related to $30,000 in cash found in Tovar Carmona's possession.

1 *Criminal Code 1995* (Cth) ss 11.1 and 307.5.

2 Ibid s 400.7(1).

3 Ibid s 308.1.

4 *R v Carmona* [2019] VCC 1148. Leave to appeal against sentence was refused: *Carmona v The Queen* [2020] VSCA 295 (Weinberg JA).

5 The appellant now appeals his sentence on the charge of dealing in proceeds of crime worth $1,000 of more. He was earlier given leave to appeal on two grounds:[5] first, that the sentence on that charge infringes the parity principle because the differential between it and the sentence imposed on his co-offender, Tovar Carmona, on the related but more serious charge of dealing in proceeds of crime worth $10,000 or more, was not reasonably open; and secondly, that the sentence on that charge is manifestly excessive.

6 For the reasons that follow, the parity ground succeeds and the appeal will be allowed.

7 ***Circumstances of offending***

8 The appellant is an Italian citizen. He came to Australia on a student visa in January 2017. At the time of the offending, he was 23 years old, and lived in an apartment in South Melbourne with three of his co-offenders, Federico Salazar, Tovar Carmona and David Gutierrez Carmona ('Gutierrez Carmona').

9 The offending relates to the arrival in Australia of two consignments of cocaine. On 20 February 2018, the first consignment, containing 5.766 kilograms of pure cocaine concealed in a torque brake pulley, was shipped from Santiago, Chile ('the Chilean consignment'). On 24 February 2018, a second consignment, containing 4.072 kilograms of pure cocaine concealed in a core cooler was shipped from Panama City ('the Panamanian consignment'). The Chilean consignment was nearly three times the commercial quantity of cocaine; the Panamian consignment was approximately twice the commercial quantity. Both consignments were addressed to a house in Parkville at which the appellant had previously lived. The appellant had no role in arranging the importation of either consignment. Tovar Carmona was the pivotal and principal player in the importations.[6]

10 On 28 February 2018, some days after the Chilean consignment arrived in Sydney, the Panamanian consignment arrived in Melbourne where it was intercepted by the

5 *Palmisano v The Queen* [2020] VSCA 298 (Weinberg JA).

6 Ibid [6].

Australian Border Force. Australian Federal Police located the cocaine inside the core cooler and substituted an inert substance. A surveillance device was inserted in the consignment and a controlled delivery was arranged.

11 The appellant's role in the offending was as a courier. He was to take delivery of the consignments at the Parkville house and transport them to the South Melbourne apartment.

12 On several days in early March 2018, the appellant waited unsuccessfully for the delivery of the Chilean consignment at the Parkville house. Salazar ultimately took delivery of that consignment at the Parkville house on 5 March 2018 and delivered it to South Melbourne with Tovar Carmona.

13 On 8 March 2018, the appellant signed for the controlled delivery of the Panamanian consignment at the house in Parkville. He loaded the consignment onto the back of a scooter and transported it to the South Melbourne apartment, leaving again on his scooter shortly afterwards. After the Panamanian consignment was opened in the appellant's absence, the Australian Federal Police entered the apartment and arrested the appellant's co-offenders: Salazar, Tovar Carmona, Guttierez Carmona, as well as Javier Caro Munoz. During a search of the apartment, police also located the Chilean consignment. The appellant was arrested when he returned to the apartment shortly afterwards. The appellant's role in relation to the delivery of the two consignments formed the basis of the first charge.

14 When he was arrested, police found $6,150 cash, in bundles of 50 dollar notes, in the appellant's backpack. This formed the basis of the second charge, dealing in proceeds of crime worth $1,000 or more.

15 Police also found 1.54 grams of MDMA, and 2.86 grams of ketamine in the appellant's backpack. A small amount of cocaine was found in his bedroom. This formed the basis of the third charge, possessing a controlled drug.

16 Reasons for sentence

17 After setting out general sentencing principles applicable to commercial–scale drug importation and possession offences,[7] the judge turned to the individual co-offenders. The judge accepted that the appellant's role in the offending was as a courier, uninvolved with the importation of the consignments, and without any knowledge of the quantities he was transporting. The appellant, the judge observed, was a relatively young and dependent drug user whose motive was to pay a debt to Tovar Carmona for cocaine provided to him by Tovar Carmona for his use.

18 The judge recognised that the appellant had offered an early guilty plea, and that the plea (as well as the appellant's positive involvement with other drug offenders in custody and a letter written by him to the Court) showed remorse. The judge characterised the appellant's prospects of rehabilitation as good, referring to his lack of prior convictions, good education, family support, and productive use of his time in custody. The judge also took account of the appellant's likely deportation, the added burden of the appellant's isolation from his family in Italy while in prison, and the significant delay between arrest and sentence. Nonetheless, the judge considered that general deterrence required the imposition of a significant term of imprisonment and non-parole period.[8]

19 While he referred earlier in his reasons, and in general terms, to the sentence imposed on Tovar Carmona, the judge made no specific reference to that sentence, or to Tovar Carmona's individual sentence on the related proceeds of crime charge, when sentencing the appellant.[9]

20 Grounds of appeal

21 As mentioned, there are two grounds of appeal:

> Ground 1: The sentence imposed for charge 2 violates the parity principle vis–a–vis the co-offender Tovar Carmona.

7 *Nguyen v The Queen* (2011) 31 VR 673, 681–3 [34] (Maxwell P), paraphrasing *R v Nguyen* (2010) 205 A Crim R 106, 126–8 (Johnson J, Macfarlan JA agreeing at 109 [1], RA Hulme J agreeing at 137 [137]); [2010] NSWCCA 238.

8 Sentencing Remarks [16].

9 Ibid [3].

Ground 2: The sentence imposed for charge 2 is manifestly excessive.

22 ***Consideration***

23 It is convenient to turn to the first ground. It was common ground between the parties that the appellant's sentence on the second charge infringed the parity principle.

24 Given that the appellant pleaded guilty to dealing in proceeds comprising $6,150 cash (compared to $30,000 in the case of Tovar Carmona), being a charge carrying a maximum penalty of 5 years' imprisonment (compared to 10 years in the case of Tovar Carmona), it was not reasonably open to sentence the appellant to a term greater that that imposed on Tovar Carmona for the more serious charge. Counsel for the respondent conceded this was so.

25 The first ground must therefore be allowed. As a result, it falls to this Court to resentence the appellant. It is unnecessary to consider the second ground.

26 It was common ground between the parties that to restore parity, the appellant must be resentenced on the second charge to a term less than the 12 months imposed on Tovar Carmona for the related but more serious charge.

27 Two questions remain.

28 The first question is the extent to which the sentence on the second charge must be reduced. In answering that question, it is necessary to consider factors relevant to sentencing for 'money laundering' offences under the *Criminal Code*.[10] These include:

(a) the seriousness of the offence in the scheme of 'money laundering' offences in div 400 of the *Criminal Code*; and

(b) the precise circumstances of the conduct which constitutes the offending, including:

[10] *Kim v The Queen* [2016] VSCA 238, [60]–[61] (Redlich, Santamaria and McLeish JJA); *Majeed v The Queen* [2013] VSCA 40, [36]–[39] (Kaye AJA, Neave JA agreeing at [1], Lasry AJA agreeing at [52]).

(i) the nature of the actions which constituted 'dealing';

(ii) the period of time over which the offending occurred;

(iii) the number of transactions involved;

(iv) the amount of money involved in the offending;

(v) the role of the offender — including his or her degree of authority and initiative — in any money laundering arrangement; and

(vi) the extent of the offender's belief or knowledge that the money is proceeds of crime.

29 Here, the offence the subject of the second charge, a contravention of s 400.7(1) of the *Criminal Code*, is, in the scheme of the 'money laundering' offences in div 400, at the low end of a wide spectrum of gravity. Division 400 lays out a hierarchy of offences in which gravity varies, first, depending on the amount of money or property involved, and secondly, within specified amount ranges, according to the applicable mental element.[11] Section 400.7 proscribes dealing in proceeds of crime worth more than $1,000 and less than $10,000. That is the second lowest amount range for div 400 offences.[12] The maximum penalty for a contravention of s 400.7(1), the most serious of the offences in the s 400.7 amount range, is a term of imprisonment of 5 years.

30 The amount the subject of the charge — $6,150 — falls in the middle of the amount range for the offence. Further, by pleading guilty, the appellant is taken to have admitted that he believed the amount found in his backpack to be proceeds of indictable crime.

31 Nonetheless, as counsel for the respondent properly conceded, there were no other aggravating factors in the conduct which constituted the offending. The 'dealing' at issue was simply possession of the money. There was no evidence of offending over

[11] *Day v The Queen* [2019] WASCA 60, [41] (Buss P, Mazza JA and Allanson J).

[12] *Criminal Code s* 400.8.

any period of time, nor evidence of any transactions. There was no suggestion that the appellant played any role, let alone any significant role, in a money laundering arrangement. His role in the drug enterprise generally was low-level and subordinate.

32 The lack of such aggravating factors, counsel for the appellant submitted, requires that there be a significant reduction in sentence. To illustrate, reference was made to a case in which a sentence was imposed for the same charge two-thirds lower than that imposed on the appellant, despite:

(a) the amount of money at issue being much larger;

(b) the offending involving multiple transactions; and

(c) the offender having a much more significant role in the drug importation enterprise at issue than the appellant.[13]

33 More generally, counsel for the appellant pointed to factors weighing in the appellant's favour that had been identified by the judge: his early guilty plea, youth and lack of prior convictions, remorse, the delay in sentence, and his particularly good prospects of rehabilitation.

34 The appellant's submissions must be accepted. We consider that a significant reduction in sentence on the second charge is required.

35 The second question that remains is what effect, if any, resentencing on the second charge should have on the appellant's total effective sentence and non-parole period.

36 The respondent contended that, notwithstanding the error in respect of the sentence on the second charge, and the need to reduce that sentence, the Court ought not reduce the total effective sentence and non-parole period. It was submitted that the total effective sentence and non-parole period imposed on the appellant may be properly regarded as 'very lenient'. This was said to be because:

(a) the maximum penalty in respect of the first charge was life imprisonment;

[13] *DPP v Hui* [2015] VCC 1373.

(b) the first charge was a 'rolled up' charge, comprising the appellant's role in attempting to possess two significant commercial quantity consignments, and so involving a higher degree of criminality than a single instance of offending;

(c) the total amount of cocaine the subject of the 'rolled up' first charge was significant, almost 5 times the commercial quantity, with a total estimated street value of between $5.9 and $7.8m;

(d) the appellant's role in the enterprise was integral, albeit low–level;

(e) a total effective sentence of 5 years and 6 months' imprisonment with a non-parole period of 3 years and 9 months' imprisonment would, in light of current sentencing practices, be at the lower end of available sentences for a single instance of the first charge, let alone a 'rolled up' charge along with a proceeds of crime charge.

37 We accept that the sentence on the first charge was lenient and that the total effective sentence is correspondingly low. We reject, however, the submission that the sentence on the second charge may be reduced without affecting the total effective sentence and non-parole period. Crucially, the Commonwealth Director did not appeal against the sentence on the first charge. The appellant remains entitled to the benefit of the leniency shown by the judge.[14] He is equally entitled to the benefit of the reduction in the sentence on the second charge, which must be reflected in a commensurate reduction in the order for cumulation. It would be fundamentally wrong to refrain from reducing the order for cumulation for the purpose of somehow mitigating what the Director now says was undue leniency on the first charge.

38 We add that we do not need to decide the question left open in *Hawke v The Queen*,[15] namely whether it would have been open to dismiss the appeal on the basis that the total effective sentence should not be reduced despite error in the sentence having been established. The respondent accepted that the appellant fell to be resentenced

[14] *Salmi v The Queen* [2020] VSCA 250, [47]–[50] (Hargrave and T Forrest JJA). The same reasoning applies in respect of the third charge, in respect of which the order for total concurrency was likewise lenient given that it involved distinct offending.

[15] [2019] VSCA 276, [17]–[22], [25] (Maxwell P and Beach JA).

on the second charge and did not urge this alternative course upon us. We observe, however, that the absence of a provision applicable to appeals, corresponding to s 280(1)(b) of the *Criminal Procedure Act 2009* (which provides for leave to appeal to be refused if there is no reasonable prospect of the total effective sentence being reduced), makes us doubt whether that course may be taken once leave has been granted.

39 Conclusion

40 For these reasons, we will order that the appeal be allowed. On the charge under s 400.7 we will set aside the sentence imposed in the County Court and substitute a sentence of 3 months, with 1 month of that sentence to be served cumulatively upon the sentence on the first charge.[16]

41 The result will be a total effective sentence of 5 years and 1 month, with a non-parole period of 3 years and 5 months.

42 Pursuant to s 6AAA of the *Sentencing Act 1991* we will declare that, but for the plea of guilty, the Court would have sentenced the appellant to a total effective sentence of 6 years and 8 months' imprisonment and would have fixed a non-parole period of 4 years and 7 months.

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[16] In terms of Commonwealth sentencing principles, the sentence on the second charge will be ordered to commence on 3 December 2024, being 2 months before the expiry of the sentence of 5 years on the first charge. The other sentences commenced on 3 February 2020. (There is no difficulty with one Commonwealth sentence commencing after the end of the non-parole period: see *R v DS* (2005) 153 A Crim R 194, 199–201 [14]–[16] (Chernov JA, Batt and Vincent JJA agreeing at 203 [25], [26]); [2005] VSCA 99.)